

DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
825 North Capitol Street N.E., Suite 5100
Washington D.C. 20002

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

THOMAS C. KENNERLY
Respondent

Case Nos.: I-00-20422
I-00-20440

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985 (D.C. Official Code §§ 2-1801.01 *et seq.*) and Title 21 Chapter 7 of the District of Columbia Municipal Regulations (“DCMR”). By Notice of Infraction (No. 00-20422) served by first-class mail, the Government charged Respondent Thomas Kennerly with a violation of 21 DCMR 700.3 for allegedly failing to properly store and containerize solid wastes.¹ The Notice of Infraction alleged that Respondent violated § 700.3 on November 16, 2001 at 1233 Raum Street, N.W., and sought a fine of \$1,000.

Respondent did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C.

¹ 21 DCMR 700.3 provides: “All solid wastes shall be stored and containerized for collection in a manner that will not provide food, harborage, or breeding places for insects or rodents, or create a nuisance or fire hazard.”

Official Code §§ 2-1802.02(e) and 2-1802.05). Accordingly, on December 21, 2001, this administrative court issued an order finding Respondent in default, assessing a statutory penalty of \$1,000 as required by D.C. Official Code § 2-1801.04 (a)(2)(A), and requiring the Government to serve a second Notice of Infraction.

The Government served the second Notice of Infraction (No. 00-20440) on December 28, 2001. Respondent failed to answer that Notice within twenty days of service. Accordingly, on March 20, 2002, a Final Notice of Default was issued, finding Respondent in default on the second Notice of Infraction and assessing statutory penalties totaling \$2,000 pursuant to D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1801.04(a)(2)(B). The Final Notice of Default also set April 10, 2002 as the date for an *ex parte* proof hearing, and afforded Respondent an opportunity to appear at that hearing to contest liability, fines or statutory penalties.

Lenard Harrison, the charging inspector in the captioned matter, appeared at the April 10th hearing on behalf of the Government. There was no appearance on behalf of the Respondent. Based upon the testimony of the Government's witness, my evaluation of his credibility, the documents admitted into evidence, and the entire record in this matter, I now make the following findings of fact and conclusions of law:

II. Findings of Fact

1. At all relevant times, Respondent Thomas Kennerly was the owner of an apartment building located at 1233 Raum Street, N.E. Petitioner's Exhibit ("PX") 103.
2. As reflected in records maintained by the District of Columbia Real Property Assessment Database, and retrieved by Inspector Harrison on November 16, 2001, Respondent's last known business address is P.O. Box 1713, Washington, DC 20013. PX 103.
3. On November 16, 2001, Inspector Harrison inspected the rear of 1233 Raum Street, N.E., and observed garbage cans overflowing with trash, partially opened plastic bags filled with trash including used plates and foodstuffs along the side of the cans, and other unidentified debris. PX 100-102.
4. The Government served the first and second Notices of Infraction upon Respondent by first class mail at his last known business address, and there is no evidence in the record that those Notices were returned by the United States Postal Service ("USPS"). This administrative court's orders of December 21, 2001 and March 20, 2002, which included copies of the Notices of Infraction, were served upon Respondent by priority mail/delivery confirmation at his last known business address. According to USPS delivery confirmation receipts contained in the record, both of these orders were in fact delivered to Respondent's last known business address.

5. Respondent has not offered any explanation for his failure to respond to the first and second Notices of Infraction.

III. Conclusions of Law

A. Notice to Respondent

1. The Notices of Infraction were mailed to Respondent's last known business address, and there is no evidence in the record that they were returned as undeliverable by USPS. In addition, this administrative court's orders of December 21, 2001 and March 20, 2002, which included copies of the Notices of Infraction, were actually delivered to Respondent's last known business address. Accordingly, Respondent received adequate notice of the charges and of the hearing date, as required by the Due Process Clause and the Civil Infractions Act. *See* D.C. Official Code §§ 2-1802.01 and 2-1802.05; *see also* *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983); *McCaskill v. District of Columbia Dep't of Employment Servs.*, 572 A.2d 443, 445 (D.C. 1990); *Carroll v. District of Columbia Dep't of Employment Servs.*, 487 A.2d 622, 624 (D.C. 1985).

B. Respondent's Violation

2. By having his garbage cans overflowing with plastic bags containing foodstuffs and other debris in the rear of his property, Respondent violated 21 DCMR 700.3 on November 16, 2001. *Accord DOH v. Danner*, OAH No. I00-70193 at 3 (Final Order, January 31, 2002) (noting, “[t]he storage of wastes in open trash cans and on the ground at Respondent’s building violated [§ 700.3] because rats easily could obtain access to food items in the plastic bags.”). A fine of \$1,000 is authorized for a first violation of this regulation and it will be imposed without reduction. *See* 16 DCMR §§ 3201.1(a)(1) and 3216.1(b).²

C. Respondent's Failure to Answer

3. The Civil Infractions Act, D.C. Official Code §§ 2-1802.02(f) and 2-1802.05, requires the recipient of a Notice of Infraction to demonstrate “good cause” for failing to answer it within twenty days of the date of service by mail. If a party cannot make such a showing, the statute requires that a penalty equal to the amount of the proposed fine be imposed. D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). If a recipient fails to answer a second Notice

² The Rodent Control Act of 2000 is Title IX of the Fiscal Year 2001 Budget Support Act of 2000, effective October 19, 2000, D.C. Law 13-172. *See* 47 D.C. Reg. 8692 (November 10, 2000); 47 D.C. Reg. 6308 (August 11, 2000). Section 910(b) of that Act established new fines for violations of various rodent control measures, including § 700.3. 47 D.C. Reg. at 6339 (August 11, 2000).

of Infraction without good cause, the statutory penalty doubles. D.C. Official Code §§ 2-1801.04(a)(2)(B) and 2-1802.02(f).

4. Because Respondent has offered no explanation for his failure to answer the first and second Notices of Infraction in this case, there is no basis for concluding that he had good cause for that failure. Accordingly, a statutory penalty of \$2,000, in addition to the fine, shall be imposed without reduction.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, and the entire record of this case, it is, hereby, this ____ day of _____, 2002:

ORDERED, that Respondent shall pay a fine and statutory penalties in the total amount of **THREE THOUSAND DOLLARS (\$3,000)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that, if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real or personal property owned by Respondent pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondent's business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

/s/ **04/15/02**

Mark D. Poindexter
Administrative Judge